***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

74-1320

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA,

Appellee,

- against -

ELIANA HORMAZABAL-TORRES and
MARGARITA HORMAZABAL-TORRES,

Appellants.

---

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

# BRIEF OF APPELLANT
# ELIANA HORMAZABAL-TORRES

LAW OFFICES OF
ALFRED LAWRENCE TOOMBS
335 BROADWAY
NEW YORK, N.Y. 10013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA,

Appellee,

- against -

Dkt. No. 74-1320

ELIANA HORMAZABAL-TORRES and
MARGARITA HORMAZABAL-TORRES,

Appellants.

---

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

# BRIEF OF APPELLANT
# ELIANA HORMAZABAL-TORRES

ALFRED LAWRENCE TOOMBS
Attorney for Appellant
Eliana Hormazabal-Torres
335 Broadway
New York, New York 10013
Tel. No.: 431-3460

INDEX



Table of Authorities

Table of Cases

Statutes

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA,

Appellee,

- against - Dkt. No. 74-1320

ELIANA HORMAZABAL-TORRES and
MARGARITA HORMAZABAL-TORRES,

Appellants.

---

BRIEF OF APPELLANT
ELIANA HORMAZABAL-TORRES

## Preliminary Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 5, 1974, upon a jury verdict finding appellant Eliana Hormazabal-Torres guilty of one count of conspiracy to distribute and possess, and one count of distribution and possession of, narcotics. The district judge (MacMahon,J.) rendered written opinions in denying appellants' motions to suppress, which are unreported.

## Statement of Issues Presented for Review

1. Did the trial court err in denying appellant's

motion to suppress seized property and her post-arrest statement on the ground that there was no probable cause for her warrantless arrest?

2. Was appellant deprived of a fair trial by reason of the inflammable content of the prosecutor's summation?

## Statement of the Case

The indictment below, filed on December 21, 1973, charged appellant Eliana Hormazabal-Torres, her sister Margarita Hormazabal-Torres (hereinafter "Eliana" and "Margarita") and co-defendant Ricardo Lawrence, all of whom are Chilean citizens, with one count of conspiracy to possess and distribute, one count of possession and distribution of, approximately 1.9 kilograms of cocaine, and one count of travel in interstate and foreign commerce with intent to distribute the proceeds of an unlawful activity, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. §§2 and 1952.

Before the commencement of trial, the district court held hearings on the motions of all three defendants to suppress evidence seized upon their arrests and their post-arrest statements. Such motions were granted in part and denied in part. Following the suppression hearing, co-defendant Lawrence pleaded guilty to one count of the indictment and

testified as a defense witness.

Trial as to Eliana and Margarita began on January 21, 1974. At the commencement of trial, the district judge dismissed the Travel Act count with prejudice. The remaining two counts were submitted to the jury and both appellants were convicted on each count. On March 5, 1974, the district court sentenced both appellants to commitment as youth offenders pursuant to 18 U.S.C. §5010(b), to be followed by special parole terms of three years. Notice of appeal as to Eliana was filed on March 12, 1974. Because both appellants had been incarcerated since the date of their arrest, bail pending appeal was not sought.

## The Suppression Hearing

Richard Lehan, a New York City police officer assigned to the New York Drug Enforcement Task Force, testified that in November 1973 he was advised by a confidential informer that one Ricardo Lawrence was then in Chile and was expected to deliver a large quantity of cocaine to New York. On December 7, 1973, the informer further advised Lehan that Lawrence had arrived in New York City that day and gave a description of him and the date and place of a scheduled meeting with a contact. Acting on this information, Lehan conducted surveillance of a meeting held that evening in the vicinity of the President Hotel in New York between

Lawrence and another unidentified individual. After this surveillance, the informer advised Lehan that Lawrence had over two kilograms of cocaine which he had brought into the country with the assistance of two females and that the narcotics were to be delivered at a specified address in upper Manhattan on December 11.

On December 11, Lehan conducted surveillance in the area of the President Hotel, where he observed Lawrence in the company of two unknown females. Shortly thereafter, he observed Lawrence again walking with one of the females and that she was carrying a large white shoulder bag. Lawrence got into an automobile with the latter female, who later got out without the shoulder bag. Lawrence's automobile was followed to West 180th Street in Manhattan, and Lawrence proceeded to the address given by the informer with the shoulder bag in his possession. Lawrence was thereupon arrested and the shoulder bag, which contained the cocaine here involved, was seized. Immediately thereafter, Lehan returned to the President Hotel and directed other police officers to the room where he had previously ascertained Lawrence was registered. There, without benefit of a warrant, Eliana and Margarita, who were the two females previously seen with Lawrence, were placed under arrest (H. Tr. 5-12).

Lehan further testified that the informer had not given him the names or descriptions of the two females who

had allegedly assisted Lawrence in importing the cocaine; that he had no idea whether the two girls seen with Lawrence on December 11 had come from Chile or were just American girls walking down the street with him; that he did not know whether the informer had ever met Eliana and Margarita, whether the informer had ever seen them in possession of narcotics, or whether they had recently come to the country; that the only information given to him by the informer was that there were two females; and that the informer had not told him anything about the white shoulder bag (H.Tr. 25-39). Lehan testified that the basis of his belief that the white shoulder bag contained narcotics was that it was the logical place to conceal a large quantity of cocaine, but he admitted that it was common at the present time for a man to carry a ladies' handbag (H.Tr. 39,45). Lehan also testified that neither he nor his fellow officers made any effort to obtain a search or an arrest warrant (H.Tr. 46).

William Brady, also a police officer assigned to the Task Force, testified that on December 11 he had observed Lawrence and a female, later identified as Eliana, walking in the vicinity of the President Hotel and that the female was carrying a large white shoulder bag. Thereafter, they both entered an automobile and Eliana got out shortly later without the bag. Brady followed Lawrence's car to the West 180th Street location where the latter got out carrying the bag. Immediately thereafter, Brady returned to the President

Hotel and arrested Eliana and Margarita (H.Tr. 47-51). Brady also admitted that it was not unusual today for a man to carry a large ladies' bag (H.Tr. 55-56). Brady further testified that at the time Eliana and Margarita were arrested he did not know whether they were registered at the Hotel or how many people were in the room (H.Tr. 63-64). Brady also testified that before observing Lawrence and the female he had no idea who the latter was or that there was such a girl, that there was nothing unusual about the conduct of either person, and that the sole basis for believing that Eliana had committed a crime was the information that a large quantity of narcotics was to be delivered and his mere suspicion that the cocaine was in the bag (H.Tr. 70-72, see also 65-66).

At the conclusion of this testimony, the court rendered its preliminary findings denying the suppression motion on the ground that the informer had provided reliable information that Lawrence was going to import narcotics with two women and that this information had been corroborated by the observations of Lawrence in the company of Eliana and the switch of the shoulder bag from her to him (H.Tr. 115-16). During the course of the trial, the district court rendered written findings of fact and conclusions of law, which were incorporated into the transcript (T.Tr. 78-84). With respect to Eliana, the court held that there was probable cause to arrest her based upon the surveillance of Eliana and Lawrence together, the transfer of the shoulder bag from her to him,

and the fact that she was found in Lawrence's hotel room after the latter's arrest. This information, coupled with the tip that Lawrence was assisted by two women, furnished probable cause, the court held.

The court then heard testimony concerning Lawrence's contention that his statements had been induced by a promise of leniency and the contentions of Eliana and Margarita that they had not understood their constitutional rights before speaking with the assistant, which motions were denied (H.Tr. 194-97, T.Tr. 72-76).[1/] The district court also heard evidence concerning a scale seized on the floor of Lawrence's hotel bedroom, and suppressed it on the ground that it was not within the reach of Eliana and Margarita when they were arrested (H.Tr. 210-11).

## The Government's Case At Trial

Officer Lehan testified as to his observations in the vicinity of the President Hotel of Lawrence and another male individual on December 7; and of Lawrence, Eliana and

---

1/ Appellant does not seek review of the district court's finding that she knowingly waived her right to remain silent and that the statement she gave was voluntary.

Margarita on December 11. He also testified as to his later observations on December 11 of Lawrence and Eliana walking together to enter an automobile and the fact that Lawrence was subsequently arrested while carrying a large white shoulder bag (T.Tr. 15-21).

Officer Brady testified that he had observed Lawrence and Eliana enter an automobile and that Eliana was carrying the shoulder bag but that when she got out shortly thereafter she was not carrying the bag. Brady further testified that he followed Lawrence's car to West 180th Street and saw the latter get out carrying the bag, whereupon he was arrested. Brady also testified to the arrest of Eliana and Margarita immediately thereafter (T.Tr. 25-30).

Police officer Pepe identified the bag which Lawrence carried and the packages contained within it, which the defense stipulated to be cocaine (T.Tr. 30-37). Special Agent Daniocek then identified the passports of Eliana and Margarita, which they had surrendered at his request upon their arrest (T.Tr. 37-41).

The government then introduced the post-arrest statement of Eliana, where she stated that she and her sister had met Lawrence in Chile and that he had offered to pay their expenses plus $1,500 cash if they would do him a favor and take something delicate with them. She further admitted that she had carried two packages under her clothing on a flight from Santiago to Lima to Miami, where she had given

them to Lawrence. She categorically denied knowing at any time what Lawrence meant by "delicate" or that the packages contained cocaine. She stated that on the day of her arrest, Lawrence had handed her a pocket book and asked her to carry it with her to an automobile, after which he dropped her at the hotel door (Tr. 50-54).

## The Defense Case At Trial

The defense called Lawrence as a witness. He admitted his own guilt and testified that the original arrangements made in Chile for the transportation of the cocaine had contemplated that the supplier would furnish a courier but that this had been prevented because of problems in getting documents. As a result, Lawrence conceived the idea to use Eliana and Margarita to smuggle the cocaine. He had met the girls four or five months previously, when he had returned to Chile after living in the United States for nine years. About a month before their departure, Lawrence had asked the sisters if they would like to accompany him to the United States and that they would have to take something delicate with them, without telling what he meant or that he meant drugs. He further testified that he had given the contraband to the girls shortly before their departure and had directed them how to conceal it on their stomachs, that he had flown separately from them in order to divert suspicion

from himself, that he had not discussed the contents of the packages with them and that they had surrendered the packages to him in Miami and that he had brought them to New York in his suitcase. Lawrence further testified that when he arrived in New York he made arrangements with the purchaser of the cocaine, that he had borrowed a white purse from one of the girls in order to carry the cocaine and that he had asked Eliana to carry the bag to the automobile for him. Lawrence categorically denied that the girls knew anything about his involvement in narcotics traffic (T.Tr. 55-70, 84-91). The defense also offered Lawrence's post-arrest statement in evidence. On cross examination, Lawrence testified that he had offered to pay the girls' expenses while in the United States, that they did not ask him what the payment was for and that he led them to believe that the packages had contained gold powder and that it was necessary to conceal it in order to take it out of Chile (T.Tr. 93-94, 97-98).

Christina Kilty testified that she had known Eliana and Margarita in Chile where they had all worked in the same office; that the girls' family was very strict and required the sisters to accompany each other on social occasions; that when she had come to the United States the sisters were envious and had requested her assistance in coming also; and that the girls had called her when they arrived in New York and had made plans to see her during the Christmas holidays. Mrs. Kilty further testified that there was no publicity in

Chile about the use of girls to smuggle narcotics into the United States and that in Chile it was accepted that a woman would trust a man and do what he requested (T.Tr. 100-113).

Margarita testified that she had come to the United States on December 5; that on the day preceeding her departure Lawrence had asked her to take a package containing something delicate with her; that she did not ask him why because she did not want to distrust him; that she did not open the package and thought that it might contain jewelry and that Lawrence had told her he would give her $1,500 for living expenses in the United States (T.Tr. 113-120).

Eliana testified she had desired to come to the United States all of her life, and especially during 1973 because of the hardships caused by well-known political disturbances; that when she and her sister had seen Lawrence in Chile he had always paid the expenses; that he had proposed that Margarita come to the United States with him and that it was necessary for her to come along in order to satisfy their family's chaperone rules. Eliana testified that Lawrence had first mentioned the package on the day before their departures; that he had said that it was delicate and should be carried on her person since customs officials were very rough; that she had thought the packages might have contained gold or diamonds since Lawrence had said he had worked in a jewelry store in New York; that she had given the packages to Lawrence in Miami and did not ever see them

again; and that Lawrence had offered to give the girls $1,500 for living expenses in the United States but that this was not a payment for bringing the packages to him. Eliana also testified that the three of them had come to New York after a day or two in Miami; that when she arrived she had contacted her friend Mrs. Kilty and arranged to visit her; and that on the evening of her arrest Lawrence had borrowed Margarita's white bag and had asked both of them to accompany him to his automobile but that Eliana had gone alone; that while on the hotel elevator Lawrence had placed the bag on her shoulder with little explanation; and that she had gotten into the automobile and left the bag on the seat when Lawrence dropped her off at the hotel. Eliana further testified that she had told the assistant United States Attorney that Lawrence had promised the two girls $1,500 as living expenses but denied that it had any connection with the packages and that she had first learned that they contained cocaine after the three of them were arrested (T.Tr. 126-47, 149-53). On cross examination, Eliana admitted that her visa called for a stay of five days in the United States and a continuation of her journey to Spain, but she stated that this was the longest visa which the United States Consulate would give her and that she had intended to apply for an extension in New York on the day after her arrest (T.Tr. 157-62).

## ARGUMENT

### POINT ONE

BECAUSE THERE WAS NO PROBABLE CAUSE TO ARREST APPELLANT, THE DISTRICT COURT IMPROPERLY DENIED HER MOTION TO SUPPRESS.

The entire basis for Eliana's arrest was the informer's advice to Officer Lehan on December 7 that Lawrence had been assisted in the importation of the cocaine by "two females" coupled with the officer's observations on December 11 of Lawrence walking in the vicinity of the hotel with two females; the subsequent reappearance of Lawrence and one of these females carrying a large white shoulder bag; their entry into an automobile and the woman's departure at the hotel without the bag; and Lawrence's arrest at the scene of the scheduled delivery while carrying the bag (H.Tr. 7-10). Neither the informer's tip nor the officer's subsequent observations furnished a reasonable basis for the belief that Eliana was engaged in the commission of a crime.

It is of vital importance to remember that the informer gave Lehan absolutely no information about the two females who had allegedly assisted Lawrence in the importation of the cocaine. Lehan had no description whatsoever of the

girls; nor any idea whether the informer had met them (H.Tr. 30, 33-34, 38-39). By contrast, Lehan had been given the name and a physical description of Lawrence and had corroborated this tip by personal observations of him meeting on December 7 with an unidentified contact, as well as by verifying other information about Lawrence (H.Tr. 5-6, 26-28, 43-45). The sum and substance of the officer's knowledge as of the moment of his first observation of Eliana on December 11 was that Lawrence allegedly had two unidentified female accomplices. Lehan did not have any information which would enable him to determine from among more than half the world's population that Eliana and Margarita were in fact those accomplices. This was aptly brought out in cross examination of Lehan:

> "Q. Did you have any information whether or not she was the girl that came from Chile or whether she was just an American girl walking down the street with him?
>
> "A. I had no idea. I had no definite indication that she was the girl who came from Chile." (H.Tr. 30).

It was therefore conceded by the police officer that as of the time of his initial observation, he had no reliable information as to Eliana which could be corroborated. Therefore, the informer's tip cannot furnish probable cause as to her within the framework of *Aguilar v. Texas*, 378 U.S. 108 (1964); *Rugendorf v. United States*, 376 U.S. 528 (1964); and *Draper v. United States*, 358 U.S. 307 (1959). Clearly, although the informer's tip was sufficient to furnish probable

cause as to Lawrence, it was insufficient as to Eliana and Margarita.

What then can be said of Lehan's subsequent observations of Lawrence walking with Eliana and Margarita, at which time the officer admittedly "had no idea" that they were the two alleged unidentified accomplices mentioned in the tip? It is of course well settled that probable cause cannot be established by one's presence at the scene of a crime or in the company of others engaged in criminal activity. *Sibron v. New York*, 392 U.S. 40 (1968); *Beck v. Ohio*, 379 U.S. 89 (1964); *Johnson v. United States*, 333 U.S. 10 (1948); *United States v. DiRe*, 332 U.S. 581 (1948). Thus, the mere fact that Lehan observed the two girls in the company of Lawrence, coupled with his information that two unidentified female accomplices were involved, did not furnish probable cause for their arrest. There was nothing suspicious about their presence with Lawrence in a public street, and at that time the police officers knew nothing more than that either sister might be "just an American girl walking down the street with him" (H.Tr. 30). Clearly, at that moment there was no probable cause to arrest either sister.

As to Eliana, we then turn to her subsequent appearance with Lawrence while carrying the white shoulder bag, their entry into the automobile and her departure from it without the bag. In connection with these events, it is important to bear in mind that the officers had no information

from their informer that the cocaine was in the white shoulder bag (H.Tr. 39). The informer had apparently never seen the narcotics and had not informed Lehan about the white shoulder bag. The sole basis for the officers' belief that the cocaine might be secreted in the white bag was their conclusion that it was "the logical thing to be transported in" (H.Tr. 39), because of the "approximate size of two kilos, I would think that it was probably in the bag at that point" (H.Tr. 72). However, it is clear that this conclusion was based upon nothing more than surmise and guesswork, and that its opposite was just as likely: that the bag may have contained clothes or gifts which Lawrence was taking to a friend of Eliana's for her or for a host of other reasons. In short, Eliana's actions were at least as consistent with innocent as with criminal activity and cannot reasonably suggest even to a trained police officer that she was then engaged in the commission of a crime. This was forcefully brought out on cross examination of Officer Brady, who observed the shoulder bag episode and participated in the girls' arrest:

> "Q. Did you have any basis to believe that Eliana Torres was committing a crime then?
>
> "A. I had suspicions at that point.
>
> "Q. Nothing more than a suspicion?
>
> "A. That's correct." (H.Tr. 72).

Certainly, the shoulder bag episode is the exact

equivalent of that conduct found to be insufficient to establish probable cause in *Henry v. United States*, 361 U.S. 98 (1959). To quote the Court's opinion in that case, Eliana's actions in walking down the street with Lawrence, riding in his car, and leaving the bag in the car were "all acts that were outwardly innocent.... The fact that [the bag may have been the 'logical thing' in which to transport the cocaine] does not make every [wo]man who carries a [bag] subject to arrest...." 361 U.S. at 103-04. It is respectfully submitted that the instant case cannot be distinguished from *Henry*, where the agents had information equally vague as in the present case, that Lawrence had two unidentified female companions.

This conclusion is supported by a legion of cases from many jurisdictions holding in analogous factual patterns that actions not criminal in themselves, done in a place and at a time where a person has a perfect right to be, cannot furnish the basis for probable cause. See, for example, *Perry v. United States*, 336 F.2d 748 (D.C.Cir. 1964)(observation of suspect exchanging "something" with known addict insufficient); *Gatlin v. United States*, 326 F.2d 666 (D.C. Cir. 1963)(description of robber as wearing trench coat insufficient to arrest man seen wearing such a coat); *Remers v. Superior Court*, 2 Cal.3d 659, 87 CalRptr. 202, 470 P.2d 11 (1970)(display of tin foil package to a companion insufficient even in light of testimony that drugs are often packaged in

tin foil); *Irwin v. Superior Court*, 1 Cal.3d 423, 82 Cal.Rptr. 484, 462 P.2d 12 (1969)(observation of airline passenger standing near suitcase bearing next consecutively numbered baggage tag to luggage known to contain narcotics insufficient); *People v. Hana*, 7 Cal.App.3d 664, 86 Cal.Rptr. 721 (1st Dist. 1970)(possession of match boxes and match books insufficient even coupled with officer's knowledge that such items could be used to make holders and containers for marijuana); *Campbell v. United States*, 273 A.2d 252 (D.C.Ct.App. 1971)(man who openly carries a television set on street cannot be considered a thief); *Cleveland v. State*, 8 Md.App. 204, 259 A.2d 73 (1969)(observation of man walking briskly and in furtive manner insufficient); *Brown v. State*, 5 Md.App. 367, 247 A.2d 745 (1968)(observation of man pushing baby carriage containing clothes, jewelry and food stuffs in a parking lot in the middle of the night insufficient).

Nor can the nebulous information about the alleged female accomplices possessed by Lehan at the time of his observations coupled with Eliana's outwardly innocent conduct furnish probable cause. This is forcefully illustrated by the leading New York case in this area, *People v. Corrado*, 22 N.Y.2d 308, 292 N.Y.S.2d 648, 239 N.E.2d 526 (1968). There, the police received a tip that marijuana would be distributed at a designated location and conducted serveillance of it. A car containing three unknown youths parked at the location; one of the youths got out and walked to another car; he then

returned and handed several manila envelopes to his companions, whereupon the youths were arrested. The New York Court of Appeals, applying *Henry*, held that the conduct of the youths was neither suspicious nor unusual and that even assuming that it might also be characteristic of the *modus operandi* of a narcotics delivery, this was insufficient to raise the level of inference from mere suspicion to probable cause. Similarly, in *People v. Verrecchio*, 23 N.Y.2d 489, 297 N.Y.S. 2d 573, 245 N.E.2d 222 (1969), the police were told by an informer that a suspect "usually" possessed heroin and they observed him in the company of two known drug users who quickly walked away upon the officer's approach. The Court of Appeals held that this was insufficient evidence to support a finding of probable cause. Similarly, in *United States ex rel. Chatary v. Rundle*, 282 F.Supp. 926 (E.D.Pa. 1968), an informer advised the police that a white man carrying a large leather camera case containing stolen merchandise would be at a certain location at a given time. The court held that the subsequent arrest of a man carrying such a bag at the described time and location was illegal because the informer had given an insufficient description of the man and because there was nothing suspicious about the activity in question.

It is respectfully submitted that cases decided by this court reaching the opposite result in differing factual patterns are clearly distinguishable and do not furnish the basis for a holding that there was probable

cause in the instant case. In *United States v. Mapp*, 476 F.2d 67 (2d Cir. 1973), the agents had conducted a lengthy narcotics investigation and saw the principal suspect enter an apartment building on numerous occasions. On the evening of the arrest, he was followed into the building while carrying a brown paper bag and was overheard in an incriminating conversation with a woman, whereupon both entered an apartment. This court held that there was probable cause to arrest the woman and to search the apartment. The detailed investigation conducted in that case provided ample basis for the belief that the woman was an accomplice of the principal suspect and that her apartment was being used as a "stash". There was no such massive investigation in the instant case.

Similarly, in *United States v. Bellamy*, 436 F.2d 542 (2d Cir. 1971), the agents were given detailed information that narcotics were being packaged in a particular location and kept it under surveillance. They observed a number of persons enter the building and saw two men leaving, one of whom behaved suspiciously when he saw the agents and attempted to dispose of a paper bag he was carrying. This court held that the detailed information possessed by the agents, coupled with the highly suspicious conduct of the men, provided probable cause. Here, the agents had no such detailed information implicating Eliana, and her observed conduct was not in the least suspicious.

Again, in *United States ex rel. Molloy v. Follette*,

391 F.2d 231 (2d Cir. 1968), the suspect was found asleep on a roof in the early morning in November. This court readily distinguished those facts from the "benign circumstances" of *Henry*. That case is in turn readily distinguished from the present one.

The final event which must be analysed is Lawrence's subsequent appearance at the designated delivery point while carrying the white shoulder bag. Clearly, there was abundant probable cause to arrest *him* at that point. But was there probable cause to arrest Eliana immediately thereafter merely because she had been seen carrying this same bag to the automobile with Lawrence? In this connection, it must be remembered that according to the officers' admission there was nothing outwardly suspicious about Lawrence's action in carrying the bag (H.Tr. 45, 55-56) and that the two sisters were arrested immediately thereafter, that no test had been made to determine the contents of the bag, and that Lawrence had made no statement implicating Eliana.

Thus, while probable cause to arrest Lawrence was furnished by the detailed description of the informer and its corroboration by the officers' observations, the arrest of Eliana must be stripped of these factors, and stands nakedly on the fact that she carried the bag and that Lawrence had it in his possession at the moment of his arrest. The police had probable cause to arrest Lawrence on the basis of the tip and its corroboration, not on the basis of his observed

activities. It was admitted by the officers themselves that even as to Lawrence, there was nothing outwardly suspicious about his behavior and that his arrest was based upon the tip and its corroboration (H.Tr. 75-76). But since the officers did not have the ingredient of detailed information and its corroboration with respect to Eliana, her innocent actions could not furnish a basis for probable cause.

Since Eliana was arrested immediately after Lawrence, the validity of her arrest must be judged as of the same time as his. The mere fact that the informant's tip proved reliable as to Lawrence cannot add anything with respect to Eliana, since the tip contained no information beyond a gender description and her observed actions were not at all suspicious. The case would of course be entirely different if the officers had obtained some information from Lawrence implicating Eliana. But they did not. Instead, they surmised that since Lawrence had possession of the bag at the time of his arrest, Eliana had knowledge of the contents of the bag when she walked to Lawrence's car and that she and her sister were the two "females" mentioned by the informer. Thus, at the moment of Lawrence's arrest, the police had no reasonable basis to believe that Eliana had knowledge of the contents of the bag and that she had knowingly assisted Lawrence in the distribution of the cocaine. Since Lawrence's arrest was based upon the tip and its corroboration rather than on his conduct, absent any description of Eliana in the

tip, her totally innocent actions cannot furnish probable cause.

In sum, then, neither Lehan's information that Lawrence had two female accomplices and his observation that Eliana and Margarita were indeed females nor Eliana's totally innocent actions can furnish any basis for a finding of probable cause to arrest Eliana.

Nor do any of the recognized exceptions to the warrant requirement justify the forced nighttime arrest here. There were no exigent circumstances which would have prevented the obtaining of an arrest warrant for the girls on the following morning. The sisters were undressed and ready for bed (H.Tr. 66, 142-43). The officers who had apparently had Lawrence under surveillance at the hotel from December 7 to 11, would have been little inconvenienced by maintaining surveillance at the sisters' hotel door overnight until a warrant could have been sought. Had the girls left the hotel room during the night if they became alarmed when Lawrence did not return or had he telephoned to alert them, and they had attempted to flee, then the police would have had some reasonable basis to believe that they were implicated and to arrest them. *Peters v. New York*, 392 U.S. 40 (1968). But the circumstances here presented are markedly different from those reserved for decision in *Mapp, supra*, 476 F.2d at 74. Here, because the agents did not even attempt to obtain a warrant when they well could have, their forced nighttime

entry was invalid.

Since there was neither probable cause for Eliana's arrest nor any exigent circumstances justifying the failure to obtain a warrant for her arrest, the district court improperly denied her motion to suppress. It follows that her post-arrest statement given to the assistant United States attorney on the following day should have been suppressed as a product of the invalid arrest under the doctrine of *Wong Sun v. United States*, 371 U.S. 471 (1963). Because without her statement, the government would have had no *prima facie* case against Eliana, the judgment of conviction should be reversed with instructions to enter a judgment of acquittal.

## POINT TWO

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY REASON OF THE INFLAMATORY CONTENT OF THE PROSECUTOR'S SUMMATION.

During the course of his summation, the assistant United States Attorney, Harry Batchelder, repeatedly ridiculed the defense of lack of knowledge, made reference to matters not in evidence, and buttressed his argument with his personal belief in appellants' guilt and by employing the prestige of his office (T.Tr. 185-200). Mr. Batchelder belittled the girls' defense as neither "credible" nor "natural", as lacking in "common sense", as the "cruelest deception", as a "ruse", -- as one unworthy of a nine year old child, to say nothing of any normal man or woman, and as an insult to the jury's intelligence (T.Tr. 187,188,189,190,192, 193,195,196,197,198,199,200). Mr. Batchelder then strongly implied that the sisters were guilty of trafficking in cocaine on other occasions by this statement:

> "I submit to you that somebody got caught. I submit to you that this is not the first instance." (T.Tr. 192).

There was not the slightest piece of evidence to support this insinuation, and it was of course completely untrue. Mr. Batchelder continually injected his own belief in appellants' guilt and the prestige of his office by making such statements

as "I was particularly impressed", "I found that testimony a little hard to believe", "I find that rather interesting", and "I ask you to show me one shred of credible evidence" (T.Tr. 192,193,195,199). In fact, analysis of the entire summation shows that Mr. Batchelder employed the first person pronoun sixty four times and used the term "the government" only once.

Immediately after the summation, counsel for both appellants moved for a mistrial, relying on recent decisions of this court. The district judge denied the motion with the comment that the prosecutor's argument was within the realm of fair argument (T.Tr. 200-01). Following the verdict, defense counsel moved for a new trial on the same ground, which was similarly denied (T.Tr. 235-36). The issue is therefore preserved for appellate review. *United States v. Semensohn*, 421 F.2d 1206, 1210 (2d Cir. 1970).

Read in its entirety, the prosecutor's summation was of the same genre which has been repeatedly criticised by this court. *United States v. Gonzalez*, 488 F.2d 833 (2d Cir. 1973); *United States v. White*, 486 F.2d 204 (2d Cir. 1973); *United States v. Bivona*, 487 F.2d 443 (2d Cir. 1973); *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973); *United States v. Fernandez (II)*, 480 F.2d 726, 741-42 (2d Cir. 1973); *United States v. Miller*, 478 F.2d 1315, 1317-18 (2d Cir. 1973); *United States v. Benter*, 457 F.2d 1174 (2d Cir. 1972); *United States v. Isaza*, 453 F.2d 1259 (2d Cir. 1972)(unpublished opinion); *United States*

*v. Puco (I)*, 436 F.2d 761 (2d Cir. 1971); *United States v. Grunberger*, 431 F.2d 1062, 1068 (2d Cir. 1970); *United States v. Hughes*, 389 F.2d 535 (2d Cir. 1968);*United States v. White*, 324 F.2d 814, 816 (2d Cir. 1963); *United States v. Persico (I)*, 305 F.2d 534, 537 (2d Cir. 1962); *United States v. Spangelet*, 258 F.2d 338, 342-43 (2d Cir. 1958); *United States v. Pepe*, 247 F.2d 838, 844 (2d Cir. 1957). In the instant case, despite this court's repeated warnings, the prosecutor flung epithets at the defense, made tawdry charges against the defendants and insinuations not inferrable from the evidence, implied that guilty was the only possible verdict, and injected his own personal veracity and prestige into the case.

Exploring, as this court must, the prejudicial impact of these remarks "within the concrete terrain of specific cases", *United States v. White, supra*, 486 F.2d at 207, it must be acknowledged that the effect of such a summation is far more damaging where, as in the instant case, the evidence against the defendant was close and evenly balanced. In such a case, as the opinion in *White* recognized, the claim of error is more compelling than where the evidence is overwhelming. Here too, this appeal is not devoid of other claims of error. Unlike *United States v. Benter, supra*, 457 F.2d at 1178, the proof of guilt can not fairly be said to be "ample".

Becuase the case against Margarita and Eliana

turned solely on the issue of their knowledge of the content of the packages and was closely drawn, the impact of improper prosecutorial conduct cannot be easily overlooked. To state the argument somewhat differently, both sisters testified that they had no guilty knowledge. By his comments concerning his lack of belief in their testimony and by asking the jury to show him "one shred of credible evidence" to support the defense, Mr. Batchelder in effect became a witness against the girls, and an unsworn one at that. This was clearly beyond the prosecutor's function and was particularly damaging in the instant case where the powers and prestige of the prosecuting attorney far outweigh the resources of two young alien girls who do not speak English. In the circumstances here presented, the injection of the prosecutor's personal integrity as a counterweight to appellants' own credibility clearly deprived them of a fair trial.

Nor can it be said that there was anything in the summations of either defense attorney which would entitle the prosecutor to reply with rebutting language or which constituted a provocation for his conduct, within the meaning of *United States v. DeAngelis*, 490 F.2d 1004, 1010 (2d Cir. 1974)(concurring opinion); *United States v. Bivona, supra; United States v. Santana*, 485 F.2d 365, 370 (2d Cir. 1973); *United States v. LaSorsa*, 480 F.2d 522, 525-26 (2d Cir. 1973); and *United States v. Benter, supra*, 457 F.2d at 1176. Neither defense counsel in any way even attacked the credibility of

the government witnesses or the integrity of the prosecution, and instead relied on the argument that the sisters' explanation for their conduct was believable (T.Tr. 166-183). Nothing that either defense counsel said in summation was in any way improper.

This court has repeatedly warned prosecutors in this circuit, often without avail, that remarks of the type here involved are subject to condemnation and in *Bivona* and *White, supra,* held that in appropriate circumstances reversal of convictions will be required. Because those admonitions came well in advance of the trial below and were unheeded by the particular prosecutor here involved, and because the issue against appellants was close and depended entirely on their credibility, the prejudicial effect of the remarks cannot be disregarded as harmless error. Therefore, even if the court were to hold that appellant's motion to suppress was properly denied, the judgment of conviction should be reversed and a new trial granted.

## CONCLUSION

Because the police officers had no probable cause to arrest appellant, her motion to suppress should have been granted, and her post-arrest statement excluded from evidence. Because without such evidence, the government would not have had sufficient proof to make out a *prima facie* case, the judgment of conviction should be reversed with instructions to enter judgment of acquittal.

Alternatively, since the prosecutor's summation deprived appellant of a fair trial, the judgment of conviction should be reversed and the cause remanded for a new trial.

Dated: New York, New York
May 1, 1974

Respectfully submitted,

ALFRED LAWRENCE TOOMBS
Attorney for Appellant Eliana
Hormazabal-Torres
335 Broadway
New York, New York 10013
Tel. No.: 431-3460